Supreme Court, U.S.
FILED
MAR 22 1993
OFFICE OF THE CLERK

No. 92-1276

In The

Supreme Court of the United States

October Term, 1992

CHARLES J. REICH v. MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE

On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CARLTON M. HENSON
Counsel of Record

McALPIN, HENSON & KEARNS
Eleven Piedmont Ctr., Ste. 400
3495 Piedmont Road
Atlanta, GA 30305
(404) 239-0774

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 92-1276

In The

Supreme Court of the United States

October Term, 1992

CHARLES J. REICH, PETITIONER, v. MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE, RESPONDENTS

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner urges this Court to grant his certiorari petition. The State obscures its due process violations by ignoring the facts and attempting to recast the issues based on more favorable, but fictional, circumstances. The fundamental and undeniable facts are that the State of Georgia illegally taxed its federal retirees, told them they had a right to refunds, and then eliminated this remedy after the time had run for any other relief.

I. Petitioner Properly Raised His Due Process Arguments Below.

The Supreme Court of Georgia issued its decision on November 19, 1991. Petitioner's due process claims were not created until the Georgia Supreme Court *sua sponte*

obliterated Georgia's refund statute in its decision. Petitioner expressly raised his due process claims in his Motion for Reconsideration before the Georgia Supreme Court. This Motion began:

> COMES NOW Charles J. Reich, Appellant in the above matter, and moves this Court for reconsideration of its decision of November 19, 1992 because the decision of this Court violates fundamental due process and cannot be sustained on appeal.

(App. D, p. 1 to Petition for Writ of Certiorari).

Petitioner then made virtually the same argument to the Georgia court that he makes in the Petition for Writ of Certiorari. He recited prior Georgia case law, direction by state officials to follow the refund statute, and the effect of the November 19, 1992 decision:

> By virtue of this Court's decision, the State affirmatively misled its federal retirees. Even without this circumstance, it is unconscionable to allow the State to collect and keep a tax after the U.S. Supreme Court has declared the tax unconstitutional. This is a patent violation of fundamental due process, and this holding cannot be sustained.

(Motion for Reconsideration p. 2, 3). This is the basic *McKesson* argument Petitioner makes in the Petition for Writ of Certiorari. It violates due process for a state to collect and keep unconstitutional taxes without providing its taxpayers a remedy. On the very next page, Petitioner advised the Georgia Supreme Court that *McKesson* would require the mandate of refunds as a remedy if the court did not reconsider its decision. With only ten days to file

the Motion for Reconsideration, Petitioner may not have made his argument perfectly, but the Georgia Supreme Court had ample opportunity to consider the due process implications of its decision. In rejecting Petitioner's Motion for Reconsideration, the Georgia court did not even trouble itself with an opinion.

II. The State Fails to Address the Remedy Roulette Feature of the Georgia Scheme.

The State argues that there is no *McKesson* or due process violation because there was no duress[1] and the State provided predeprivation remedies. Whether other remedies were theoretically or academically available to Georgia retirees is not the central issue.[2] Regardless of the merits of the purported predeprivation remedies here, the State of Georgia affirmatively told its citizens that there was a refund remedy, and this dissuaded them from attempting other remedies. The State then took away this

---

[1] The State says possible criminal sanctions of O.C.G.A. § 48-7-2 are not relevant for duress because no state official would act so "unreasonably or in bad faith" towards a taxpayer "with a bona fide dispute." (Reply Brief p. 9). This ignores at least one reported Georgia decision where this very conduct took place. *Wright v. Forester,* 192 Ga. 864, 16 S.E.2d 873 (1941).

The State also claims the 25% penalty is not duress because the Revenue Commissioner "may waive" any penalty if "he reasonably determines" that the default was "reasonable." O.C.G.A. § 48-2-43. Petitioner and many other retirees have received a Notice of Assessment that threatens the imposition of penalties.

[2] The Georgia Supreme Court was so concerned about the existence of a remedy that it felt compelled to create a new one (pay under protest) when it decided the case below.

refund remedy after the time had run for any other relief. The State simply ignores these facts in its reply brief. It writes about a case that does not exist and is not before this Court.

The State does not satisfy due process when it creates an illusory remedy, suckers its citizens into following this remedy, then yanks this remedy away and tells its citizens that the time has run for any other remedies. For the foregoing reasons, Petitioner respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

CARLTON M. HENSON
McALPIN, HENSON & KEARNS
Eleven Piedmont Ctr., Ste. 400
3495 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 239-0774